

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TIMOTHY E. KENT,

Plaintiff,

vs.

KATHY DANIEL, JOHN DOES and  
JANE DOES,

Defendants.

NO. CV-11-5031-JPH

**ORDER ADOPTING REPORT AND  
RECOMMENDATION AND DISMISSING  
FIRST AMENDED COMPLAINT**

**1915(g)**

BEFORE THE COURT is Plaintiff's "Memorandum of Law in Opposition to the Court's Report and Recommendation to Dismiss First Amended Complaint With Prejudice," along with his Declaration, which the Court liberally construes as Plaintiff's Objections. ECF No. 26. Petitioner, a prisoner at the Airway Heights Correction Center, is proceeding *pro se* and in *forma pauperis*; Defendants have not been served.

In his Objections, Mr. Kent simply reiterates his claim that his Eighth Amendment rights were violated by the absence of an intake health screening procedure at the Benton County Jail, and the alleged denial of adequate medical care in violation of the Fourteenth Amendment. He contends he has asserted a cognizable claim under 42 U.S.C. § 1983.

Mr. Kent signed his initial complaint on February 15, 2011, a

1 little over a month after he was booked into the Benton County Jail on  
2 January 6, 2011. In that complaint, Plaintiff named supervisory  
3 Defendants and failed to present any facts showing how the named  
4 Defendants violated his constitutionally protected rights.

5 In his First Amended Complaint, Plaintiff named the jail captain  
6 and two John Doe Defendants. He claims a John Doe Defendant advised him  
7 there were no lower bunks available at the time of intake, although  
8 Plaintiff had stated he had a pre-existing back injury, and Plaintiff  
9 claims he saw an available lower bunk in his living unit; Defendant  
10 Daniel allegedly told Plaintiff to "sign up for sick call" when he  
11 complained to her about his pre-existing back injury on January 12,  
12 2011; and on January 14, 2011, Defendant John Doe Maygard told Plaintiff  
13 he would be moved soon. Plaintiff states he was not assigned a lower  
14 bunk until February 16, 2011, and was then transferred to another  
15 facility two weeks later.

16 Once again, the allegations against the named Defendants are not  
17 sufficient to rise to the level of deliberate indifference to a serious  
18 medical need. Providing misinformation regarding the availability of a  
19 bunk does not rise to the level of a constitutional violation. Plaintiff  
20 indicates he was seen by medical personnel when he signed up for sick  
21 call. Plaintiff presented no facts showing any of the identified  
22 Defendants was responsible for the one month delay in receiving a lower  
23 bunk assignment or any facts that would demonstrate deliberate  
24 indifference, rather than mere negligence. Negligence is not actionable  
25 in a claim under 42 U.S.C. § 1983. *Broughton v. Cutter Lab*, 622 F.2d  
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1 458, 460 (9th Cir. 1980).

2 Plaintiff complains he was forced to climb into bed and jump  
3 approximately six feet off the bed because there were no ladders.  
4 Plaintiff's choice to jump, rather than to climb/slide back down, has  
5 allegedly resulted in re-injury of his back. He states he is currently  
6 participating in weekly physical therapy to ease the pain, and has been  
7 issued a lower bunk health status report at the Airway Heights  
8 Correction Center.

9 Once again, Plaintiff's allegations against identified Defendants  
10 are insufficient to show deliberate indifference to his serious medical  
11 needs. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Furthermore,  
12 Plaintiff's bald assertions regarding the lack of intake screening for  
13 contagious diseases, without any facts showing he was harmed thereby,  
14 does not rise to the level of either an Eighth or Fourteenth Amendment  
15 violation. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990)

16 For the reasons set forth above, in the Order to Amend or  
17 Voluntarily Dismiss, ECF No. 8, and in the Report and Recommendation of  
18 the Magistrate Judge, **IT IS ORDERED** the Report and Recommendation, ECF  
19 No. 21, is **ADOPTED in its entirety** and the First Amended Complaint is  
20 **DISMISSED with prejudice** for failure to state a claim upon which relief  
21 may be granted against the named Defendants under 28 U.S.C. §§  
22 1915(e)(2) and 1915A(b)(1).

23 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner  
24 who brings three or more civil actions or appeals which are dismissed as  
25 frivolous or for failure to state a claim will be precluded from  
26

1 bringing any other civil action or appeal *in forma pauperis* "unless the  
2 prisoner is under imminent danger of serious physical injury." 28  
3 U.S.C. § 1915(g). Plaintiff is advised to read the new statutory  
4 provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's  
5 complaint may count as one of the three dismissals allowed by 28 U.S.C.  
6 § 1915(g) and may adversely affect his ability to file future claims.

7 IT IS SO ORDERED. The District Court Executive is directed to  
8 enter this Order, enter judgment, forward copies to Plaintiff at his  
9 last known address, and close the file. The District Court Executive is  
10 further directed to forward a copy of this Order to the Office of the  
11 Attorney General of Washington, Criminal Justice Division. The Court  
12 certifies any appeal of this dismissal would not be taken in good faith.

13 DATED this 16<sup>th</sup> day of September 2011.

14  
15 S/ Edward F. Shea

16 EDWARD F. SHEA  
UNITED STATES DISTRICT JUDGE

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